United States Department of Labor
Employees' Compensation Appeals Board

LONNIE E. LOWE, Appellant	)	
and	)	**Docket No. 05-71**
	)	**Issued: May 2, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Bowie, MD, Employer	)	

Appearances:
Lonnie E. Lowe, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 4, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated June 14, 2004 in which an Office hearing representative affirmed the Office's January 23, 2004 decision, the constructed position of golf club manager represented appellant's wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of golf club manager represented appellant's wage-earning capacity; and (2) whether the Office properly denied modification of his loss of wage-earning capacity determination.

FACTUAL HISTORY

On January 6, 2001 appellant, then a 49-year-old letter carrier, filed a traumatic injury claim alleging he injured both arms on January 5, 2001 when he slipped on ice and snow while

delivering mail. The Office accepted his claim for left elbow sprain, left wrist sprain, left wrist dislocation, left wrist contusion, left forearm joint derangement and authorized surgery on September 6, 2001. Appellant did not stop work. He received appropriate compensation benefits for all periods of disability.

Appellant came under the treatment of Dr. Norman J. Cowen, a Board-certified orthopedist, who provided a history of appellant's work-related injury and diagnosed traumatic sprain of the left wrist. On September 6, 2001 he performed a de Quervain's release and radial styloidectomy of the left wrist. Dr. Cowen diagnosed arthritis of the radial styloid carpal joint, possible ligament rupture over the scapholunate area and de Quervain's disease. Appellant was treated by Dr. Victor Tseng, a Board-certified orthopedist, who diagnosed degeneration of the left wrist status post extensor synovectomy and resection of the radial styloid. He noted that appellant was a golfer and continued to experience pain in the left wrist and underwent cortisone injections.

In a letter dated May 23, 2002, the Office requested that Dr. Tseng prepare a work tolerance questionnaire. In a report dated June 4, 2002, Dr. Tseng advised that appellant's left wrist condition was permanent and stationary. He advised that appellant could work eight hours per day with restrictions of no constant repetitive lifting over 10 to 15 pounds using the left wrist.

On October 3, 2002 appellant was referred for vocational rehabilitation. In a report dated November 2, 2002, the rehabilitation counselor advised that appellant was relocating to Arizona. He noted that appellant received military service-connected disability and tuition assistance through the Veterans Administration Rehabilitation and Counseling Division for training at the San Diego Golf Academy, which was located in Arizona. The counselor noted that appellant was scheduled to graduate in May 2003, with an associates degree and would like to work in a government golf facility as a manager.

On December 31, 2002 the rehabilitation counselor noted that a rehabilitation plan was developed for the job title of golf instructor and golf club manager. It was noted that appellant was a caddy for professional golfers from the age of 10 to 20 and had completed an associates degree program in applied science in occupational business at the San Diego Golf Academy. The rehabilitation counselor provided a job description for the position of a golf course manager and golf course instructor. The rehabilitation counselor noted that the labor market survey documented a reasonable labor market for entry level employment at golf resorts and clubs and the wages ranged from $8.00 per hour to $32,000.00 per year, the hiring was regular and computer knowledge was helpful. The counselor further noted that the position was consistent with the medical restrictions provide by Dr. Tseng on June 4, 2002, whereby appellant could work eight hours per day with restrictions of no constant repetitive lifting over 10 to 15 pounds using the left wrist.

In a letter dated January 6, 2003, the Office notified appellant that the rehabilitation plan for a golf course manager and golf instructor was determined to be within his work limitations with restrictions of no constant repetitive lifting over 10 to 15 pounds. The Office advised that the rehabilitation counselor's vocational evaluation and survey of the local labor market revealed

a wage-earning capacity of $24,500.00 per year. The Office further advised that, at the end of the rehabilitation program, whether employed or not, it would reduce his compensation.

In reports dated February 28 to June 2, 2003, the rehabilitation counselor noted that appellant graduated from the San Diego Golf Academy in May 2003 and requested an extension of his rehabilitation plan until he returned from a golfing course in Texas on May 16, 2003. The rehabilitation counselor noted on July 2, 2003 that appellant was not committed to the job search effort and was not keeping appointments or was arriving late for appointments.

In a memorandum of conference dated May 28, 2003, appellant indicated that he developed a right arm condition, which he believed to be related to the injury of January 5, 2001. The claims examiner advised appellant that the right arm was not an accepted condition.

On July 31, 2003 the rehabilitation counselor noted that appellant was offered an assistant manager position at a golf resort and declined the job. The counselor advised that appellant did not participate as agreed in his rehabilitation plan as he did not regularly attend his computer training and did not participate in a directed job search. The rehabilitation counselor noted that appellant received 90 days of placement services but did not obtain employment. In a job classification statement dated August 29, 2003, the rehabilitation counselor noted the job description of a golf instructor/golf pro, verified the wage of the position and found that such a position was reasonably available in appellant's commuting area. In a report dated October 29, 2003, the rehabilitation counselor closed the case.

Appellant submitted treatment notes from Dr. R. Richard Maxwell, a Board-certified orthopedist, dated September 22 to November 24, 2003, who noted treating appellant for right arm pain that appellant attributed to his work-related injury of January 5, 2001.

On November 18, 2003 the Office issued a notice of proposed reduction of compensation, finding that appellant was no longer totally disabled. The Office noted that appellant was partially disabled and had the capacity to earn wages as a golf club manager/assistant at the rate of $500.00 a week.

In a letter dated December 8, 2003, appellant indicated that he still had pain in his left wrist and developed pain in his right arm and cervical region. Appellant advised that he did not decline a position as reported by the rehabilitation counselor and indicated that he diligently looked for a suitable position. A report from Dr. Tseng dated April 20, 2003, noted appellant's complaints of sharp pain in the left wrist and diagnosed a symptomatic left wrist caused by overuse during a move to Arizona in August. He noted that appellant would ultimately require surgery; however, he was not currently a good candidate for surgical intervention. An x-ray of the left wrist revealed abnormalities of the navicular radial junction with fragmentation of the radial styloid and narrowness between the proximal pole of the navicular and that articulating surface of the radius.

By decision dated January 23, 2004, the Office adjusted appellant's compensation to reflect his wage-earning capacity as a golf course manager. The wage-earning capacity determination took into consideration such factors as appellant's disability, training, experience,

age and the availability of such work in the commuting area in which he lived. Attached to the decision was a notice of appeal rights, specifying the procedures necessary for reconsideration, a hearing before the Office or an appeal to the Board.

In a letter dated February 12, 2004, appellant requested a review of the written record and submitted additional medical evidence. Appellant submitted reports from Dr. Maxwell dated January 19 to May 21, 2004, who treated appellant for right shoulder and neck pain and diagnosed cervical spondylosis and possible radiculopathy. In reports from February 6 to 20, 2004, he noted that appellant was a golf instructor who has experienced pain in both upper extremities, which occurred after the January 2001 fall. He diagnosed a wrist fracture, rotator cuff tear on the left and right and cervical spondylosis. A magnetic resonance imaging (MRI) scan of the right shoulder dated January 27, 2004 revealed a full thickness tear of the tendon. A MRI scan of the left elbow dated March 15, 2004 revealed no abnormalities. A report dated February 9, 2004 from Dr. Tseng noted appellant's complaints of left wrist, elbow and shoulder pain. He advised that appellant could work full time with restrictions of no constant repetitive lifting over 10 to 15 pounds using the left hand. Dr. Tseng discharged appellant from his care.

In a decision dated June 14, 2004, the hearing representative affirmed the January 23, 2004 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[2] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[3] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[4]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized

[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[2] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[3] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[4] *Id*.

by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitation, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.[5] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[6]

ANALYSIS -- ISSUE 1

In a December 31, 2002 report, the Office rehabilitation counselor determined that appellant was able to perform the position of a golf instructor and golf club manager. She determined that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that confirmed the wage of the position as $24,500.00 per year with the state employment services. The rehabilitation counselor noted that the labor market survey documented a reasonable labor market for entry level employment at golf resorts and clubs. She advised that the position was consistent with the medical restrictions provide by Dr. Tseng on June 4, 2002, whereby appellant could work eight hours per day with restrictions of no constant repetitive lifting over 10 to 15 pounds using the left wrist. The rehabilitation counselor provided a job description for the position of a golf course manager and golf course instructor. In an August 29, 2003 report, the rehabilitation counselor advised that appellant received 90 days of job placement and appellant did not find employment. The counselor advised that an updated labor market survey revealed the market remained favorable and that appellant did not find employment because he did not regularly attend his computer training and did not participate in a directed job search.

The Office received a work capacity evaluation dated June 4, 2002 from appellant's attending physician, Dr. Tseng, who advised that appellant's left wrist condition was permanent and stationary. He advised that appellant could work 8 hours per day with restrictions of no constant repetitive lifting over 10 to 15 pounds using the left wrist. Dr. Tseng did not make any finding that appellant remained totally disabled or unable to do any work due to residuals of his accepted injuries of left elbow sprain, left wrist sprain, left wrist dislocation, left wrist contusion, left forearm joint derangement. Other reports from Dr. Maxwell dated September 22 to November 24, 2003, neither indicated that appellant remained totally disabled or unable to work due to residuals of his accepted conditions.[7]

[5] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[6] *Id. See Shadrick* at 5 ECAB 376 (1953).

[7] To the extent that appellant asserted that his right arm condition was caused by his left arm injury and was disabling, the Board notes that appellant has not submitted reasoned medical evidence supporting that he sustained a consequential injury. *See Bernitta L. Wright*, 53 ECAB 514, 516 (2002) (regarding the burden of proof in establishing a claim for consequential injury). Furthermore, Office procedures provide that medical conditions arising subsequent to the work-related injury or disease will not be considered in determining whether a selected position is medically suitable. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.[8]

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of golf course manager represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of golf course manager and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office properly determined that the position of golf course manager reflected appellant's wage-earning capacity effective January 23, 2004. Because the Office followed proper procedures in determining appellant's loss of wage-earning capacity, the Board affirms the Office's reduction of appellant's compensation.

LEGAL PRECEDENT -- ISSUE 2

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[9] The burden of proof is on the party attempting to show modification of the award.[10]

ANALYSIS -- ISSUE 2

After the Office properly found that appellant could perform the duties of a golf course manager, the pertinent medical issue is whether there had been any change in his condition that would render him unable to perform those duties.[11] For a physician's opinion to be relevant on this issue, the physician must address the duties of the selected position.[12] However, medical evidence submitted by appellant after the loss of wage-earning capacity determination did not specifically address whether the position of golf course manager was unsuitable.

Dr. Maxwell's reports of January 19 to May 21, 2004 diagnosed cervical spondylosis, possible radiculopathy, wrist fracture, rotator cuff tear on the left and right and cervical spondylosis, which occurred after the January 2001 fall. However, the physician did not provide any medical rationale as to how these conditions, could now disable appellant from a position of a golf course manager. Additionally, he failed to note a change in appellant's condition which

[8] *Dorothy Jett*, 52 ECAB 246 (2001).

[9] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[10] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986), *James D. Champlain*, 44 ECAB 438 (1986).

[11] *Phillip S. Deering*, 47 ECAB 692 (1996).

[12] *Id.*

would render him unable to perform the position of golf course manager.[13] Due to this lack of rationale, Dr. Maxwell's opinion is of diminished probative value and is, therefore, insufficient to overturn appellant's previously calculated wage-earning capacity.[14] Other reports from Dr. Tseng dated February 9, 2004, noted appellant's complaints of left wrist, elbow and shoulder pain. However, he failed to note a change in appellant's condition which would render him unable to perform the position of golf course manager nor did he retract his previous opinion which indicated that appellant could perform this position under the restrictions of no constant repetitive lifting over 10 to 15 pounds using the left hand. Rather, the physician advised that appellant could continue to work under these previously established restrictions and discharged appellant from his care. Therefore, these physicians did not establish that appellant could not perform the duties of a golf course manager.

The Board finds that there is insufficient medical evidence to establish a change in appellant's employment-related condition such that a modification of the Office's loss of wage-earning capacity determination would be warranted. The evidence from Dr. Maxwell and Dr. Tseng do not indicated that the position of golf course manager was unacceptable. Consequently, appellant has failed to carry his burden of proof to establish modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that the Office properly determined that the position of golf course manager reflects appellant's wage-earning capacity effective January 23, 2004, the date it reduced his compensation benefits. The Board further finds that appellant did not submit sufficient medical evidence, following the Office's January 23, 2004 decision, to justify modification of the Office's loss of wage-earning capacity determination.

[13] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[14] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated June 14, 2004 is affirmed.

Issued: May 2, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member